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AUTHOR Leed, Arthur
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ABSTRACT

As more government agencies request information and records from colleges and universities, it is important that all institutions establish standard procedures for handling such requests. Administrators should: learn the personality of the particular agency or office making the request; establish a professional, cooperative, non-adversarial relationship; and disagree only when necessary. Requesters and types of questions may include: (1) police/Federal Bureau of Investigation checks; (which tend to be general fishing expeditions): (2) subpoenas and discovery devices (which should be forwarded to the General Counsel's office); (3) student records (for which access is governed by the federal Family Educational Rights and Privacy Act); (4) Immigration and Naturalization Service, United States Information Agency, and Department of Labor (these agencies usually seek data on foreign nationals studying or working at a particular institution); (5) Office of Federal Contract Compliance (which examines a school's equal opportunity compliance); and (6) Office for Civil Rights of the Department of Education (which investigates individual complaints and reviews compliance). The National Collegiate Athletic Organization, a private organization, may also request information from member institutions. (Contains references with sources of further information.) (MAH)

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CAMPUS LIFE AND GOVERNMENT INVESTIGATIONS

June 19, 1996
Arthur Leed
The University of Georgia
Athens, Georgia

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Arthur Leed

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

The subject of dealing with the myriad investigators from federal and state agencies defies easy analysis or simple advice. The constant barrage of requests and demands for all types of information and records seems to grow louder by the day. Despite the downsizing of government, the cuts in budgets and staff, and the occasional shutdown, a week never passes when I do not hear of some new and different type of investigation or request for information. In seeking to enforce the law, those calling upon you will often ask you to violate some statute or regulation of another agency. They will usually set impossible time frames for responding to voluminous requests for information. When they depart your campus, you may not hear back from them for many months or years. The best advice I can offer is to learn the personality of the particular agency or office you are dealing with as early as possible. Establish a professional, cooperative relationship, and only disagree when necessary. Establishing an adversarial relationship at the outset will only increase the pain. The law may be the determining factor in a court or hearing. It may, however, have a small effect on the process you encounter up until that time.

Police

It is not uncommon for the Federal Bureau of Investigation (FBI) and other police agencies to contact university personnel to ask questions or request records pertaining to faculty, staff, and students. I have been surprised to find over the years that the large majority of inquiries that have come to my attention have **not** been investigations of actual or suspected crimes. "Routine" checks, particularly in regard to foreign students and employees, seem to be the most common form of inquiry. Particularly since the end of the cold war, these checks have tended to be less focused on a particular threat and lean toward fishing expeditions.

The authority and responsibilities of the FBI have never been perfectly clear, and its operations since the days of J. Edgar Hoover have often been the subject of considerable controversy. In the past decade, the FBI has garnered the most complaints from the higher education community for its "Library Awareness Program." In that program FBI agents queried university librarians about the reading habits of foreign nationals. In light of tremendous controversy and very bad publicity, the program was disbanded in 1987. But an agent for another federal agency, presumably on his own authority and probably with some time to kill, made similar inquiries at The University of Georgia just a few years ago.

Most inquiries by the FBI and other police agencies, will usually not start by a contact with your office. Faculty and staff are usually the first contacted by imposing figures with badges who just want to ask a few routine questions. All employees should be advised to always contact the General Counsel's office whenever they receive inquiries of any kind from investigating agencies.

In order to achieve consistency in handling these matters, all institutions should establish standard procedures for dealing with outside requests for information. Most non-emergency requests for records of public institutions can be handled under your state's Open Records/Freedom of Information/Sunshine Law type statutes. Although the FBI and other police agencies do not wish to get on line with the rest of the public, this will usually ensure fairly quick, consistent responses

in a routine fashion.

Subpoenas and discovery devices

All employees should be advised on a regular basis that subpoenas or any other types of "legal" requests for records should be delivered to the office of the General Counsel on the day they are received. Although phoney subpoenas are fairly rare, legalistic forms and letters can be very threatening to your employees. They should never respond without your review and approval.

Although equally threatening to the non-lawyer, a valid subpoena will usually make your job much simpler. Unfortunately, there is often some type of defect in subpoenas from investigatory agencies and litigant's attorneys. Subpoenas and other discovery devices, such as requests for Production of Documents, should be examined closely for defects as to service, parties, and jurisdiction. This can be complicated by the interplay of the rules of your jurisdiction with that of the court or other authority issuing the subpoena.

In cases where there are perceived defects, the most practical course of action is to contact the party whose records have been requested. Often that party will consent to the release, or will file their own objection to the subpoena. Any consent to release should always be confirmed in writing.

Gag orders, precluding notice to the party whose records are being requested, are more troublesome. Assuming the gag to be valid, it will be necessary to file your own objection to the subpoena. I have found, particularly with federal agencies, that the threat of an objection is often sufficient to have them remedy the defect or withdraw the subpoena.

Student Records

Access to a student's educational records is governed by the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, and its implementing regulation at 34 C.F.R., Part 99. FERPA generally precludes the release of information pertaining to students other than "directory information".

There are, however, numerous convoluted exceptions which may come into play when dealing with external investigations and discovery requests. For example, student disciplinary records are generally not releasable, but results of disciplinary action may be released to victims of alleged crimes of violence. 34 C.F.R. §99.31(13). Campus police records dealing with the same incident, however, may be released. 34 C.F.R. §99.8. Information subject to FERPA may be released pursuant to a subpoena or court order, but presumably not in accordance with other discovery requests, such as Requests for Production of Documents. 34 C.F.R. §99.31(9)(I). Notification to the student is required before compliance with a subpoena, but there are a number of exceptions to that requirement. 34 C.F.R. §99.31(9).

Although very well known in the education community, most police and investigatory agencies have no knowledge of FERPA or its requirements. It is not uncommon to have a federal agency ask you to violate this federal statute. Administrators should be very aware of the complexities of the FERPA regulations and keep a copy nearby. You should also contact the office of Family Policy Compliance of the U.S. Department of Education, 600 Independence Avenue, S.W., Room 1366, Washington, D.C. 20202-4605, (202) 260-3887. Also see Kaplin, W., and Lee, B., *The Law of Higher Education* (3d ed., Jossey-Bass, 1995) at §14.16.

Federal Administrative Agencies

There are numerous federal and state administrative agencies which may come calling on your campus, and there are many sources of information and guides for dealing with these investigations. It is often wise to consult the agencies' own policy manuals and investigator's guides. They are usually available from the agency.

Some helpful resources include:

Fair Employment Practices, Human Resources Series, 3 Volumes, Warren, Gorham & Lamont: Boston, Massachusetts, 1992.

Hadley, Ernest C., *A Guide to Federal Sector Employment Law and Practice*, Fourth Edition, Dewey Publications, Inc.: Arlington, Virginia, 1995.

Williams, Douglas L., *Responding to Government Investigations*, C527 ALI-ABA 89, (1990).

Williams, Douglas L., *Handling the EEOC Investigation*, C983 ALI-ABA 1121, (1995).

A Few Federal Agencies

Federal agencies will vary tremendously in their approach to investigations and reviews. A discussion of a few of them follows.

The Immigration and Naturalization Service

The Immigration and Naturalization Service (INS), which was created in 1891, is a branch of the Department of Justice. Its missions include facilitating the legal entry of foreign nationals into the United States, prevention of illegal entry, and removal of those aliens who enter or remain illegally. Like many other government agencies, the INS has suffered with management and budget problems for many years. The General Accounting Office has issued 57 critical reports on the INS since 1970, and there have been dozens of negative reports by congressional committees over the years. "House Report Calls for Quick Fix of INS," *The Los Angeles Times*, August 25, 1993 at 3. With the current hot debate concerning the future immigration policy of the United

States, this agency may soon be undergoing a major reorganization. If anything, the agency may be asked to do more with little expectation of adequate resources.

The primary investigatory activities you are likely to encounter from this agency are requests for information on foreign nationals studying at your institution. In 1985, the INS regulations were amended to facilitate information collection and record keeping on foreign nationals studying in the United States. The regulations, 8 C.F.R. 214.3(g)(2), provide that INS will periodically send institutions a list of foreign students attending that institution. The institution is required to provide certain information on these students, and other foreign nationals studying at the institution within sixty days. Numerous problems plagued this program from the outset, and no lists (Form I-721) have been issued in the past seven years.

INS jurisdiction is divided into more than thirty-five districts, and district directors possess a tremendous amount of autonomy in most matters. With the lack of an adequate central record keeping system, most requests for information will originate from these district offices. Although it is difficult to generalize in a system like this, the most common problems I have found are the short time frames in the requests. The INS will usually not exceed its authority by asking for information it is not authorized to collect. Their flexibility in extending time frames, however, depends very much upon the individual and office with which you are dealing. You should always attempt to negotiate with the INS.

Prompted by concerns arising from the Gulf War that foreign students may pose a potential security risk, the INS established an inter-agency task force to look into the matter and make recommendations. The task force report, *Controls Governing Foreign Students and Schools that Admit Them*, was issued in April of 1996. As part of a comprehensive overhaul of all procedures involving foreign students, the recommendations include development of an entirely new record keeping system. Engineering and implementation of a new system, even without a major overhaul in immigration policy, will certainly take a number of years.

The INS is not the only agency you may have to deal with concerning foreign nationals on your campus. The United States Information Agency administers exchange visitor programs, and they can be very demanding in requesting information which is spread throughout various units of your campus. See 22 C.F.R. §514.10. The United States Department of Labor (DOL) investigates matters regarding the employment of foreign nationals as temporary workers under the H-1B program, 20 C.F.R. Part 655. On April 4, 1996, the Inspector General of DOL, in an executive summary of an audit report of the labor certification program, found the department's role to be "little more than a paper shuffle," and stated that DOL should be removed from the process.

For an overview of the various employment issues you are likely to encounter with these agencies, consult Ware, D., Sommers, P., and Speake, S., "Immigration Law and Higher Education: Employment of International Employees," 20 *Journal of College and University Law* 51 (1993). See also Yenkin, Amy (ed.) *Adviser's Manual of Federal Regulations Affecting Foreign Students and Scholars* (rev. ed. National Association of Foreign Student Affairs, 1994-95).

Office of Federal Contract Compliance

The Office of Federal Contract Compliance (OFCCP) is a division of the U.S. Department of Labor Employment Standard's Administration. The OFCCP enforces various federal civil rights mandates as applied to organizations which have federal contracts. These include §503 of the Rehabilitation Act, The Vietnam Era Veterans' Readjustment Assistance Act of 1974, The Immigration Reform and Control Act of 1986 (IRCA), and Executive Order 11246, 30 Fed. Reg.12319, as amended by Executive Order 11375, 32. Fed. Reg. 14304.

Executive Order 11246, which will cover the bulk of your dealings with this agency, requires employers who do business with federal agencies to abide by certain equal opportunity provisions. It requires that they refrain from discriminating against employees or applicants for employment on the grounds of race, color, religion, sex, or national origin. It also requires that they take affirmative steps to ensure that applicants and employees are not discriminated against on these grounds. There are other requirements including non-discrimination notices to employees and applicants, and furnishing certain information and reports to the Secretary.

Most of the activity of the OFCCP involves dealings with private business concerns, and they are not attuned nor sympathetic to the nature of higher education. They are enforcement oriented and can be very adversarial from the first communication. The agency conducts compliance reviews and complaint investigations. A group of complaints, typically from a labor organization, will often trigger a compliance review of your entire institution. These can be massive undertakings involving hundreds of thousands of documents and long visits to your campus. A compliance review of a particular department may be instituted in connection with an individual contract entered into by that department.

Requests for documents will usually be very broad and far reaching. Although you may have to grit your teeth, smile, and comply, it is advisable to attempt to diplomatically steer them toward the areas you perceive to be relevant to the issues at hand. The OFCCP focus is typically on statistical analysis of a situation. Although they probably will not ask, you should provide anecdotal evidence of your good works whenever possible.

After the complaint investigation or compliance review, the agency will typically seek to negotiate a formal Conciliation Agreement. They will generally not settle through less formal means such as simple letters of agreement and they can be very hard bargainers.

The ultimate sanction for noncompliance is debarment from all federal contracts. This is extremely rare, however, particularly in the context of higher education. Although you may be convinced that you will ultimately win on a particular claim or issue, you will often be put in the position of determining whether the long, arduous fight through the administrative chain is worth the ultimate cost.

Office for Civil Rights of the U.S. Department of Education

The mandate of the Office for Civil Rights (OCR) of the U.S. Department of Education is to ensure that the organizations which received federal funds from the Department of Education are in compliance with certain civil rights statutes. These statutes include Title VI of the 1964 Civil Rights Act, Title IX of the Education Amendments of 1972, §504 of the Rehabilitation Act of 1973, the Americans With Disabilities Act and the Age Discrimination Act. They prohibit discrimination based upon race, color, national origin, sex, disabilities, and age.

OCR conducts investigation of individual complaints, as well as compliance reviews. As an agency which deals exclusively with educational institutions, it is much more understanding of how institutions of higher education operate. OCR will generally be more flexible than agencies which deal primarily with employment issues in the private industry setting. The OCR investigator, an Equal Opportunity Specialist (EOS), you are dealing with probably works exclusively with institutions of higher education and may specialize in just a few types of issues. This is usually helpful, at least in terms of initial definition of the issues. Never assume, however, that your on-campus expertise is any less than that of OCR. This is particularly true in the area of evaluating and accommodating disabilities.

The EOS can often be very cooperative in reaching workable solutions which can be documented in an exchange of letters. Any question referred to their legal staff can be much more problematic. Their attorney staff can be much more adversarial and less likely to give on any point. (I can say this having been one of those attorneys).

In the days of the *Adams* litigation, OCR's focus was on desegregation issues and the processing of complaints and compliance reviews under court mandated time frames. OCR has moved from an overall emphasis on enforcement to more of a willingness to provide technical assistance. A simple request for assistance, in light of some perceived problem, can be a much better approach than an adversarial stance.

OCR can be difficult to deal with because of the fluid nature of the law in the area of civil rights. OCR's amorphous positions on controversial, fluid issues are troublesome, but not necessarily the fault of the agency. The current affirmative action debate, particularly in light of *Hopwood*, and the ongoing Title IX athletics uncertainty, are two examples. See "Colleges Get Conflicting Messages on Affirmative Action," *The Chronicle of Higher Education*, September 29, 1995 at A57, and "Education Dept. Further Clarifies Policy on Title IX," *The Chronicle of Higher Education*, January 26, 1996 at A33. OCR has always been under attack for doing either too much or too little. For contrasting views, see "Civil Rights Office Still Takes it Easy, Activists Charge," *The Chronicle of Higher Education*, April 21, 1995 and "One City's Encounter with DOE's Brigade," *The Washington Times*, April 14, 1996 at B4.

As part of the much maligned Department of Education, the future of OCR is unclear. "Conservative Group Issues Plan to Kill U.S. Education Dept.," *The Chronicle of Higher Education*, April 19, 1996 at A36. The positions of all the major Republican presidential candidates included the elimination of the department, and the functions now performed by OCR may very well be shifted to some other agency in the not too distant future.

The National Collegiate Athletic Association

Unlike most of the investigatory agencies you will encounter, the NCAA is a private organization. Affiliation is based on contract between the NCAA and the individual institutions which make up its membership. The contract requires that member institutions follow and enforce NCAA rules and comply with NCAA investigations and sanctions. See the NCAA Constitution Art. 2.5.1. In return, member institutions can compete at NCAA sanctioned events and tournaments and can share in the revenue generated by those events.

The NCAA Committee on Infractions enforces all alleged rules violations. It follows a four-step enforcement process to investigate, make determinations, and impose sanctions. The four steps are: a preliminary inquiry, an official inquiry, a pre-hearing conference, and an official hearing.

1. Preliminary Inquiry
   After the Committee receives a charge of a rule violation from a "responsible source," the Committee begins a preliminary inquiry. This is supposed to be a thorough investigation of the charge to determine whether adequate evidence exists to warrant an official inquiry. The institution is notified of the commencement of any Preliminary Inquiries.

2. Official Inquiry
   If adequate evidence of a violation exists, the Enforcement Committee begins an Official Inquiry. The staff of the Committee notifies the President of the institution being investigated. This letter should list all charges, ask for a meeting date and ask for full cooperation in the inquiry. The committee staff will also ask the institution to do an independent investigation of the charges and report its findings to the Committee.

3. Pre-Hearing Conference
   After the Committee does an Official Inquiry, it conducts a Pre-Hearing Conference. The Pre-Hearing Conference includes the affected individuals and institutions and NCAA representatives. The Committee informs the parties of all the evidence it intends to use to prove the allegations at the Official Hearing. The parties may review memoranda and documents relating to the alleged infractions.

4. Official Hearing
Finally, the Committee will hold an Official Hearing. Institutions and affected parties may present arguments and information to the Committee. After the Official Inquiry, the Committee issues written findings of any violations and will recommend corrective action and penalties. Appeals can be brought to the NCAA Council or to the full NCAA membership.

Criticism of the NCAA

There has been much criticism over the years of the lack of clarity in defining terms, such as "responsible source," and other standards which trigger the inquiries and hearings. Investigators have very broad discretion in determining the scope of investigations. Commentators have also criticized the lack of judicial review and the lack of an impartial presiding officer at the hearings. See James, K., "College Sports and NCAA Enforcement Procedures: Does the NCAA Play Fairly? *National Collegiate Athletic Association v. Miller*," 29 *Cal. W. L. Rev.* 429 1993.

There have been statutory attempts to place due process constraints on the NCAA. More than ten states have considered proposals or passed legislation aimed at NCAA investigatory power. A Nevada statute is the most significant in that it has been successfully challenged by the NCAA. The Nevada Statute, Nev.Rev.Stat. §398.155 - 398.255, attempted to impose due process requirements on NCAA investigations. It provided institutions with the right to confront and cross-examine witnesses, imposed a preponderance of the evidence standard on all findings of rules violations, required an impartial presiding officer, and the keeping of a record of the proceedings. It also provided for judicial review and monetary sanctions for failure to follow proper procedures.

In *NCAA v. Miller*, 795 F.Supp. 1476 (D.Nev 1992), *affirmed*, 10 F.3d 633 (1993), *cert. denied*, 114 S.Ct. 1543 (1994), the statute was struck down as a restriction on interstate commerce and an intrusion by the state on the private contract between the NCAA and its member institutions.

There is always much discussion of simplification and reduction of the NCAA's voluminous rules governing intercollegiate athletics. The NCAA has conducted numerous studies over the years, but has taken virtually no action. Everyone seems to agree that there should be fewer rules, but no one can agree on the elimination of any one of them. See, Remarks of Mr. Dan Dutcher, NCAA Director of Legislative Services, 22 *Journal of College and University Law* 33 (1995). See generally, "Focus on Intercollegiate Athletics," 22 *Journal of College and University Law* 1 (1995).

Some General Points of Advice

The realities you will encounter in dealing with these agencies will vary tremendously depending upon the particular agency, the local office, and the individual investigators and/or attorneys assigned to your case. Based upon influences such as fluctuating budgets and alternating pressures to investigate one week and settle the next, it is difficult to give general, practical advice on any particular day or investigation. One agency which has frequently engaged in long, comprehensive investigations on our campus, has recently been attempting to settle complaints before they are officially logged on the agency's books. The one constant you can rely upon is that the further you are from the nearest office of the investigating agency the less likely they will do an on site investigation as the travel funds run out at the end of the fiscal year.

One of the biggest practical problems is responding to hurried requests for thousands of documents. Agencies have their own agendas and are not particularly sympathetic to the fact that records are spread throughout many locations on your campus. Always try to negotiate some leeway, but you should be willing to put up with the inconvenience if it will not damage your case. If you have established a professional, cooperative relationship with the agency, they will generally be more willing to take your concerns into account.

No matter how cumbersome it may be, always route all responses through your office and screen all documents which your institution is providing. This can be very difficult when many offices on campus are providing thousands of pages of redundant material. We have learned from painful experience, however, that it is preferable to a surprise, weeks or years down the road.

Most agencies will not be at all receptive to defenses which involve the uniqueness of the higher education setting, nor the protections of academic freedom. Neither the United States Supreme Court nor your local GS-11 are likely to be impressed with the distinctive nature of higher education in the context for a federal investigation. The Court held in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), that judges should give deference to faculty when asked to review a "genuinely academic decision." However, see *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), in which the Court rejected a University's claim that peer review materials were privileged from disclosure in an EEOC investigation. See also Frost, L., "Shifting Meanings of Academic Freedom: An Analysis of *University of Pennsylvania v. EEOC*," 17 *Journal of College and University Law* 329 (1991), Pacholski, S., "Title VII in the University: The Difference Academic Freedom Makes," 59 *U. Chi. L. Rev.* 1317 (1992).

For more than fifteen years, federal agencies have attempted to use various forms of Alternative Dispute Resolution (ADR) techniques to settle complaints. As a mediator who received his initial training from a federal agency, I highly recommend that you seriously consider these options. In terms of the sheer quantity of resources expended and the quality of the final outcome, ADR can certainly be preferable to most investigations. You should, however, closely examine the specific process to be employed. Investigative agencies are not known for their expertise in these areas, and there should be clear, written explanations of the commitments you are making in entering any ADR process. Although their ADR systems are improving, the use of ADR by federal agencies has not been particularly successful over the years. See Silver, M., "The Uses and

Abuses of Informal Procedures in Federal Civil Rights Enforcement," 55 *Geo. Wash. L. Rev.* 482 (1987).

Always enter into any investigation with an assurance of cooperation. It pays to be as cooperative as possible, but you are going to have to determine for yourself the issues on which you must be firm. When to take a stand and circle the wagons is usually the most difficult decision. Standing up to the NCAA is a very dangerous proposition for your athletic program. Refusing to cooperate with some aspect of a federal agency investigation, on the other hand, may result in years of delay, referrals to headquarters for policy interpretations, and the ultimate withering away of the complaint or issue.

Establishing a professional relationship and dealing in a courteous, cooperative fashion is almost always the best approach. An adversarial stance, no matter the approach taken by the agency, will simply not help your cause. Do not bother to fight matters which are not relevant to the outcome of your case. Put up with the merely inconvenient, and always focus on the bottom line outcome.

I do not mean to suggest that in dealing with investigatory agencies, our institutions should do anything less than comply with the letter and spirit of the law. Unfortunately, an investigating agency's opinion of the right thing to do will often not coincide with your own. You should also always remember that the stamp of approval from the investigation agency is not the final word. There is often the private plaintiff who will seek to revisit the entire matter in litigation.